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No. 504

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

CHARLES ALLEN TAYLOR,

Petitioner,

v.

NEIL McELROY, A. TYLER PORT,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR PETITIONER ON MOOTNESS

JOSEPH L. RAUH, JR.
JOHN SILARD,
1631 K Street, N. W.
Washington 6, D. C.,
Attorneys for Petitioner.

Page

St. Pierre v. *United States*, 319 U.S. 41 ..... 2, 9
Southern Pacific Terminal Co. v. *I.C.C.*, 219 U.S. 498 .... 2, 9
Standard Fashion Co. v. *Magrane-Houston Co.*, 258 U.S. 346 2
United States v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290 ..... 2, 9
Walling v. *Helmerich & Payne*, 323 U.S. 37 2
Walling v. *Reuter Co.*, 321 U.S. 671 2

* * * * * * *

Testimony of Industrial Personnel Security Review Director Fenton before the Senate Subcommittee on Constitutional Rights, 84th Cong., 2d Sess., pursuant to S. Res. 94, pp. 606-607 4

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The Government's last-minute Reply Memorandum, containing new contentions of fact and law not heretofore made, evidences the Government's quite understandable concern over the clear and present danger of reversal; even more it indicates panic at this Court's mere consideration of the case which bespeaks the need for that consideration far more eloquently than anything petitioner can say.[1] At the

[1] We regret the inadequacy of this Memorandum. The Government's Reply, containing 24 pages of essentially new contentions of fact and

same time, the Government has not had the temerity to oppose petitioner's suggestion (Opposition, pp. 2-3, 29-30) that the Court postpone the issue of mootness until after it has had the benefit of oral arguments in accordance with its practice in similar cases. See e.g., *Walling* v. *Helmerich & Payne*, 323 U. S. 37, 43; *Walling* v. *Reuter Co.*, 321 U. S. 671; *St. Pierre* v. *United States*, 319 U. S. 41; *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346; *Southern Pacific Terminal Co.* v. *I.C.C.*, 219 U. S. 498; *United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290. In the absence of such opposition, and in view of the bitterly contested issues of fact concerning the "likelihood of recurrence" upon which continued justiciability rests, adherence of this Court to its practice of postponing the issue of mootness until it has had the benefit of the oral arguments would appear especially warranted and necessary.

As concerns the question of mootness itself, we take this opportunity to note the significant shift of the Government's Reply away from the previous contention that the mere granting of clearance has disarmed the Court of its jurisdiction (Memorandum, p. 6). No longer urging that the *Trans-Missouri-Southern Pacific* doctrine is applicable only to the discontinuance of challenged *private*, as distinguished from *governmental*, practices, the Government's Reply instead places almost total reliance upon two different contentions, one of which went completely unmentioned in its first Memorandum and the other of which was only obliquely hinted at there.

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law, was not made available to petitioner until Friday, February 13th, coincident with its filing. In order to file this Supplemental Memorandum within the time allotted by the Office of the Clerk, it was necessary to print it on Monday, February 16th, along with petitioner's brief on the merits (attached hereto as Exhibit A), due at the same time as this Supplemental Memorandum. Since, in similar cases, this Court has followed the practice of postponing the issue of mootness until it has had the benefit of oral arguments (see text), petitioner will file a more detailed response to the Government's Reply in his reply brief on the merits.

The first of these contentions (Reply, pp. 20-21) is that, since petitioner raises constitutional issues, the Court should refrain from deciding petitioner's case "in the absence of a concrete, present, actual, and existing controversy . . ." But this is a confusion of policy and jurisdiction; the fact that petitioner raises constitutional issues does not go to the question whether the cause is moot for want of a "case or controversy." Moreover, petitioner's case is by no means limited to constitutional issues; petitioner urges in his brief on the merits (Appendix A, pp. 50 to 56) that the statutory foundation of the Industrial Personnel Security Review Program (if indeed there is any statutory foundation for the Program itself), must be interpreted to require a fair hearing, including confrontation and cross-examination. Indeed, the Government appears to concede justiciability with respect to such a statutory contention, stating that "in litigation in which the questions are statutory . . . it may be proper to accede to the 'public interest in having the legality of the practices settled' " (Reply, p. 20).[2] Finally, as we demonstrated in our Opposition to Government's Suggestion of Mootness, there is here a "concrete, present, actual and existing controversy" concerning petitioner's rights—a controversy arising from the Government's continuing enforcement of the challenged and unaltered Regulation against confrontation and the petitioner's continuing and very real jeopardy thereunder.

The Government's other major contention is that a "new general rule" (Reply p. 1) of the Industrial Security Program renders unlikely petitioner's subjection to security proceedings in "the present or the reasonably foreseeable

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[2] The Government's implication that no statutory issue is involved illustrates the danger of action on the question of mootness prior to full arguments which will illuminate all the facts bearing on the issue of mootness.

circumstances" (Reply, p. 14).[3] What we distill from the Government's studied ambiguity concerning this "new general rule" is that, in the future, the Hearing Boards will weigh the security defendant's "position" against his "personal history" (Reply p. 13). If we surmise correctly, the Government is now saying that, although they still deem petitioner to be a *perjurious ex-Communist*, they are putting into effect an unexplained system whereby even such persons may at times have access to secret information on the basis of some equally unexplained comparison of "position and personal history."[4]

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[3] The Government states in its Reply that "the most curious facet of petitioner's Opposition is its total failure to refer to, or to discuss, the pointed suggestion in the Government's mootness memorandum . . . that the action taken in petitioner's case on December 31 was the result of a general reconsideration of one aspect of the Industrial Security Program . . ." (p. 4). Petitioner did, of course, notice that the Government had made a reference to the Acting Secretary's Memorandum of December 31 concerning "the level of clearance" as one of three factors which the Government took "the opportunity to note" (Memorandum p. 10); but since the Government did not appear to rely upon what it merely took "the opportunity to note," petitioner did not feel called upon to respond. The consideration of "level of clearance" in the Acting Secretary's Memorandum appeared to make little or no change in the program (see Testimony of Industrial Personnel Security Review Director Fenton before the Senate Subcommittee on Constitutional Rights, 84th Cong., 2d Sess., pursuant to S. Res. 94, pp. 606-607). Moreover, the so-called "pointed suggestion" is *not* the one the Government is now making, for instead of a "level of clearance" rule, the Government now suggests that the new factor in the program calls for consideration of the employee's "position and personal history" (Reply p. 13). At any rate, neither the original suggestion of "level of clearance" nor the present contention of "position and personal history" (Reply p. 13) substantially affect the "likelihood of recurrence" which is the touchstone of justiciability.

[4] We respectfully suggest, despite the Government's efforts to have this Court assume the contrary, that the Government's "new general rule" was in fact "Taylor-made." It was conceived, according to the Government, "when petitioner's case was brought to the attention of the Acting Secretary" (Reply p. 5); it was given a New Year's Eve premature birth the day petitioner was "cleared" shortly after this Court granted certiorari; it has yet to grow to the point where the Government can state the rule in sufficiently understandable terms to promulgate it.

Initially, we suggest that this Court is being asked to weigh "likelihood of recurrence", the touchstone of justiciability, in the light of a rule that has never been promulgated or even stated with understandable clarity. The only official basis for this "rule" is the Memorandum of December 31st from the Acting Secretary of Defense to the Assistant Secretary; but this Memorandum nowhere states what the Government now vaguely suggests the new policy to be (see n. 3, *supra*). And, while the Solicitor General suggests that the new rule now exists (Reply p. 5), the Department of Defense has supplied him with no Regulation, nor even any instructions to the field, placing the "rule" into effect.[5] Nothing that has yet been presented to this Court is sufficiently concrete to give the Court any assurance against likelihood of recurrence. Possibly by the week of March 23rd, the time now scheduled for oral arguments, the Government will have seen fit to promulgate its new rule in some understandable fashion to permit this Court's consideration of its impact upon the issue of mootness.

We believe that, if the "new rule" is removed from its present amorphous state and given body and substance, it will be found to increase rather than decrease the likelihood of petitioner's subjection to renewed proceedings under the unaltered no-confrontation system. Heretofore, a "secret" clearance was at least good for all secret work; now, it appears that the slightest change in work may upset security "clearance" based on a delicate balance of "position" and "personal history," particularly for one whom the Government holds to be a *perjurious* ex-Communist.[6]

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[5] It is strange, indeed, if in fact there has been a new general rule since December 31, 1958, that now, almost seven weeks later, no public Regulations or instructions to the field are sufficiently well advanced for the Solicitor General to be able to present them to this Court.

[6] For some unexplained reason, the Government's 24-page Memorandum never once refers to the fact that the Department, on October 13, 1958,

In petitioner's work at Bell Aircraft, the classified materials his job requires him to see are not fixed but changing; at any moment the tenuous balance of his "position and personal history" may shift without any initiative on his part. Furthermore, he may himself desire to obtain different work at Bell or elsewhere; but, unless the relief requested is obtained, petitioner is frozen in his present work, for any such change of position is likely under the new tenuous balance to bring down upon him another 2½ year tragedy.

Finally, even assuming that petitioner's work and personal history continues identical in every respect with present conditions—a most unwarranted assumption—the continuous clearance system which has resulted in multiple jeopardy for so many other security defendants (Opposition pp. 22-25) hardly renders unlikely renewed proceedings in the case of one deemed by the Defense Department to be a perjurious ex-Communist. Significantly enough, the Government expressly refuses (Reply n. 11, p. 14) to discuss petitioner's demonstration (Opposition pp. 22-25) that those once seriously charged under the no-confrontation security programs are never free of jeopardy.[7] The simple fact is that neither petitioner's last minute "clearance" nor the amorphous change in the standard of clearance protects him

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explicitly found petitioner guilty of perjury in denying past Communist affiliations. In its effort to minimize the Defense Department's repeated findings against petitioner (Reply n. 4, p. 6), the Government refers to everything except the fact that the Department of Defense had expressly found petitioner guilty of perjury. We respectfully suggest that it is not unlikely that the Government will find some way to proceed against one whom the Government asserts to be a perjurious ex-Communist, if this Court's process should fade into the distance.

[7] The Government asserts (Reply p. 15) that the petitioner is in no different position than thousands of others who have been accorded clearance under the program. On the contrary, petitioner's position is wholly different, for he has been found a perjurious ex-Communist and the Government still holds him to be such. The others were found innocent on the merits.

from the ever-present peril of the challenged "hearing" system which the Government continues to maintain in all its vigor.

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Petitioner might have chosen to end this hastily prepared Memorandum here. But the Government's suggestion to this Court that petitioner has made a number of factual errors and assumptions (even though the Government concedes (Reply p. 2) that most of these "have no direct bearing on the legal problem of mootness"), demands an immediate, even if curtailed, response:

1. The Government suggests (Reply p. 2) that petitioner misread its initial Memorandum when he suggested that the Government had conceded that clearance proceedings might recur. The sentence on which petitioner based his statement appears on page 7 of the Government's initial Memorandum: "Here, on the other hand, the suit attacks, not merely some injurious conduct which may or may not recur, but a particular official administrative order . . ." Having reread the sentence in question, we think our interpretation was by no means unwarranted. In any event, the issue is not whether the Government had conceded a likelihood of recurrence, but whether, as we have demonstrated, there is in fact a likelihood of recurrence.

2. The Government, suggesting that petitioner misread the Defense Department's decision of October 13, 1958 finding petitioner a security risk for the second time, argues that "there are no findings . . . that petitioner lied when he said that he had never had a sympathetic interest in Communism . . ." (Reply p. 3). The Court's attention is invited to page 122 of the record where the Department informed Mr. Taylor that his "sworn reply" and his "testimony" "were deliberately and knowingly either false or

misleading" in denying that he had ever been a member of the Communist Party and that he had "no knowledge of the subversive aims and purposes of the Communist Party."

3. The Government suggests (Reply p. 3) that petitioner was wrong in assuming that the Defense Department rested its findings of October 13, 1958 on "acceptance of the information given by all 'six secret informants' . . ." While we do not understand what difference it makes whether the findings rested on one or on all six secret informants, we suggest that our conclusion was an appropriate inference from the fact that the Chairman of the Board, at the very last stages of the proceedings, on August 1, 1958, read the synopses of the statements of all six informants into the record (R. 102-104) as "information of an evidentiary nature" (R. 436) and rejected petitioner's motion "either to strike or to limit the use of the material" (R. 441).

4. The Government takes umbrage (Reply p. 4) at petitioner's suggestion that it was the filing of the petition for certiorari and the granting of that petition by this Court that caused the Government's action in petitioner's case. Even now, however, the Government does not deny petitioner's assertion that between October 13, 1958, when petitioner was for the second time finally denied clearance, and the date of the filing of the petition for certiorari, the matter was not under review.

5. The Government suggests (Reply pp. 9-13) that petitioner is wrong in indicating that the Secretary of Defense has violated his own Regulation in failing to make findings on the charges against petitioner and in failing to find his clearance "clearly consistent with the interests of the national security." We would have assumed that procedural regulations in general terms such as these would be no less applicable to the Secretary than to his subordinates. At any rate, petitioner did not cite the Secretary's failure to

comply with his own Regulation in order to invoke the *Service* rule. Rather petitioner cited the Secretary's failure to find petitioner's clearance consistent with the interests of security and, indeed, to make any findings whatever, to show that the Secretary had not cleared petitioner on the merits (which the Government now concedes) and to demonstrate that the Secretary's hurried action in violation of what were, at the very least, policies of his own Department, bespoke the direct relationship between this Court's grant of certiorari and the Secretary's effort, without altering the challenged hearing procedure, to avoid its review.

6. The Government states (Reply n. 12, p. 15) that its inquiry indicates that the new personnel security questionnaires required of petitioner were exclusively company-imposed by Bell. Counsel has rechecked with petitioner since receipt of the Government's reply and petitioner reaffirms his earlier statement to counsel that, upon balking at filling out new forms, the Bell official informed him that the "Government security people required it."

7. The Government suggests (Reply p. 19), in its discussion of this Court's decisions on the question of mootness,[8] that "petitioner attacks the principles of mootness which the Court has been applying to withdrawal of challenged

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[8] Of the ten cases cited by the Government (Reply p. 17), a number were wholly unopposed. The remainder have either been previously answered (see Opposition n. 6, 7, p. 16), or are newly cited but equally inapplicable decisions. For instance, the Government now cites *St. Pierre v. United States*, 319 U.S. 41. But that case was an appeal from a contempt conviction which had been served rather than an equity action falling within the *Trans-Missouri-Southern Pacific* doctrine. As the Government's *St. Pierre* brief in this Court (p. 10) itself explicitly recognized, cases such as *Trans-Missouri* and *Southern Pacific* "establish" that "where an injunction is sought a case can continue even though the defendant is not at the moment engaging in the activity sought to be enjoined; in such cases there is nothing to prevent him from resuming such conduct of his own volition. Such injunctions still have force and are operative as to a defendant's future conduct."

government orders as an unfair 'double standard' . . ." On the contrary, petitioner's Opposition flatly states (p. 14) that the *Government's* "suggestion of a 'double standard' of mootness was long ago expressly rejected by the Court . . ." The Government's efforts to make it appear as though petitioner were accusing this Court of applying a "double standard" misreads the clear sentence from petitioner's Opposition just quoted.

8. The Government suggests (Reply p. 22) that "petitioner did not ask, in his District Court complaint, for declaratory or injunctive relief with respect to the Defense Department's industrial security regulation itself . . ." But, even under the most technical rules of common law pleading, one would have thought that a prayer for injunctive and declaratory relief against an unfair hearing procedure denying confrontation was a request for relief against the Regulation promulgating that unfair procedure.

Conclusion

On the basis of still unrepudiated charges of Communism and perjury and by virtue of a wholly unfair "hearing" system, petitioner has suffered loss of means of livelihood and devastating security taint. Now, without repudiation of its charges, without removal of the taint, without revision of the hearing system whose validity the Government continues to assert,[9] it suggests that this Court is powerless to make petitioner whole for his past injuries or to safeguard

[9] The repentant discontinuance of *sub judice* practices has sometimes rendered unnecessary the granting of equitable relief against those practices; but this is the first instance where, without either repentance or discontinuance of challenged practices, it is urged that jurisdiction has been lost. The Court will, we hope, carefully note that no change whatever has even been suggested in the no-confrontation procedure which petitioner challenges; nor does the undefined change in the standard of clearance in any way reduce petitioner's jeopardy under the challenged hearing procedure.

him from the obvious likelihood of repeated subjection to the "hearing" system which his suit challenges. However anxious the Government may to be save that hearing system from judicial invalidation by giving petitioner a clearance without finding him either "innocent" or "secure", the Constitution does not empower the Government by such means to disarm this Court of its power to grant petitioner the full vidication and protection to which he is entitled.

It is respectfully submitted that respondents' suggestion of mootness be denied or, if the question of mootness be deemed worthy of further consideration, that its determination be deferred until after the Court has had the benefit of the oral arguments.

Respectfully submitted,

JOSEPH L. RAUH, JR.,
JOHN SILARD,
1631 K Street, N. W.,
Washington 6, D. C.,
Attorneys for Petitioner.

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